

No. 79-635

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HOWARD J. JESSE, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID DEUTSCH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
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Washington, D.C. 20530*

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Petitioner seeks review of the Tax Court's dismissal of this case on the ground that his petition had not been filed with that court within the 90-day period following mailing of a notice of deficiency, as required by Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts are as follows: On June 29, 1977, the Commissioner of Internal Revenue mailed a notice of deficiency to petitioner (Pet. App. 2a). In response to the notice, petitioner's accountant mailed to the Internal Revenue Service in Los Angeles, Cali-

fornia, a letter dated August 4, 1977, that petitioner now asserts should have been taken to be a petition to the Tax Court (R. 5).¹ Petitioner alleges that a copy of this letter was transmitted to the Tax Court, although the date of such alleged transmittal does not appear in the record (R. 26, 38-48). The Tax Court has no record of having received that copy of the letter (R. 20).

After the 90-day period following the mailing of the notice of deficiency had expired, petitioner sent a copy of the August 4, 1977, letter to the Tax Court. That copy was filed as a petition on October 12, 1977. Petitioner does not rely upon the October 12 filing as it was out of time (see Pet. 5). Instead, he contends (Pet. 10-25) that he should be permitted to prove that a "first" petition (the August 4, 1977, letter) was mailed to the Tax Court within the prescribed 90-day period, and that this petition should be deemed to have been filed when mailed.

1. The court of appeals correctly upheld the Tax Court's dismissal of petitioner's suit. As a general rule, the Tax Court has jurisdiction only if a petition is filed within the prescribed 90-day period provided by Section 6213(a) of the Code. *Shipley v. Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977); *Vibro Mfg. Co. v. Commissioner*, 312 F.2d 253, 254 (2d Cir. 1963). The only exceptions to this jurisdictional requirement are set forth in Section 7502 of the Code. That Section provides relief in two limited

¹ "R." refers to the Joint Appendix filed in the court of appeals.

circumstances. First, if a petition that is in fact delivered to the Tax Court was mailed during the 90-day period and bears a postmark to that effect, the petition is deemed filed as of the date of mailing even if it is received by the Tax Court after the expiration of the 90-day period. Since the "first" copy of the August 4, 1977 letter, which petitioner alleges was mailed during the 90-day period, was never received and filed in the Tax Court, the first statutory exception (Section 7502(a) and (b)) is inapplicable.

Second, if a petition to the Tax Court is sent by registered or certified mail within the 90-day period, Section 7502(c) provides for a *prima facie* presumption that the petition was delivered to the Tax Court as of the date of mailing. Since petitioner did not send the August 4 letter by registered or certified mail, the second exception is likewise inapplicable.

Petitioner nevertheless contends that he should be allowed to prove by testimony from the person who allegedly mailed the alleged petition that it was mailed to the Tax Court on August 4, 1977. As he views the matter, there is no rational distinction between regular mail and registered and certified mail, and therefore his alleged petition, after his proof of mailing, should be presumed to have been delivered to the Tax Court. But petitioner ignores the fact that one of the purposes of Section 7502 was "to avoid testimony as to date of mailing in favor of tangible evidence in the form of an official government notation." *Shipley v. Commissioner*, *supra*, 572 F.2d at 214. Mailing a

petition to the Tax Court is not equivalent to filing unless one comes within the terms of Section 7502. *Drake v. Commissioner*, 554 F.2d 736, 738-739 (5th Cir. 1977); *Boccuto v. Commissioner*, 277 F.2d 549, 552-553 (3d Cir. 1960).

2. Petitioner further argues (Pet. 26-27) that the decision below violates his due process rights and the separation of powers doctrine (*ibid.*). But petitioner was not prohibited from proving relevant facts. Instead, the facts he seeks to prove were held to be irrelevant because, even if they were true, they would not have brought him within the reach of the operative statutes. For the same reason, the proffered testimony of the employee of the Internal Revenue Service who acknowledged that he received the letter addressed to the Service (Weissman) (Pet. 27-29) was irrelevant. At most, Weissman's testimony would have corroborated the accountant's testimony that the August 4, 1977 letter was mailed to the Internal Revenue Service in Los Angeles. Since the accountant's testimony was beside the point, there was no reason to admit Weissman's corroborating testimony.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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